

EXHIBIT G

75ulwhip Plea

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----X

3 UNITED STATES OF AMERICA,

4 v.

07-CR-0087 (JSR)

5 JOHN WHITTIER,

6 Defendant.

7 -----X

8 New York, N.Y.
9 May 30, 2007
5:26 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13
14 APPEARANCES

15 MICHAEL J. GARCIA
16 United States Attorney for the
17 Southern District of New York
STEVEN D. FELDMAN
18 Assistant United States Attorney
19 STILLMAN, FRIEDMAN & SHECHTMAN, P.C.
Attorneys for Defendant
20 BY: MARJORIE J. PEERCE, ESQ.
KATIE LACHTER, ESQ.

21 ALSO PRESENT: TED CACIOPPI, FBI

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1 (In open court)

2 (Case called)

3 THE DEPUTY CLERK: Counsel, please state your name for
4 the record.

5 MR. FELDMAN: Good afternoon, your Honor. Steven
6 Feldman on behalf of the government. With me is Special Agent
7 Ted Cacioppi of the FBI.

8 THE COURT: Good afternoon.

9 MS. PEERCE: Good afternoon, your Honor. Marjorie
10 Pearce and Katie Lachter from Stillman, Friedman & Shechtman
11 for Mr. Whittier.

12 THE COURT: Good afternoon.

13 All right. My understanding is that the defendant
14 wishes to withdraw his previously entered plea of not guilty
15 and enter a plea of guilty to counts 1, 2, and 4 of the
16 indictment pursuant to a plea agreement, is that correct?

17 MS. PEERCE: That's correct, your Honor.

18 THE COURT: All right. We'll place the defendant
19 under oath.

20 THE DEPUTY CLERK: Please stand and raise your right
21 hand.

22 (Defendant sworn)

23 THE DEPUTY CLERK: Please state your name.

24 THE DEFENDANT: John Hunting Whittier.

25 THE DEPUTY CLERK: Please spell your last name slowly.

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1 THE DEFENDANT: W-H-I-T-T-I-E-R.

2 THE DEPUTY CLERK: Please be seated.

3 THE COURT: Mr. Whittier, let me first advise you that
4 because you're under oath, anything that you say that is
5 knowingly false could subject you to punishment for perjury or
6 obstruction of justice or the making of false statements. Do
7 you understand?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Very good. Do you read, write, speak and
10 understand English?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: How far did you go in school?

13 THE DEFENDANT: I graduated undergraduate.

14 THE COURT: And how old are you now?

15 THE DEFENDANT: I'm 40 years old.

16 THE COURT: Are you single or married?

17 THE DEFENDANT: I'm married.

18 THE COURT: Do you have any children?

19 THE DEFENDANT: Two.

20 THE COURT: Are they living at home?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you ever been treated by a
23 psychiatrist or psychologist?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: When was the last time you had any such

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1 treatment?

2 THE DEFENDANT: Within the month.

3 THE COURT: And without going into any of the
4 specifics, what's the general nature of the issue? What are
5 you being treated for?

6 MS. PEERCE: It's complicated, your Honor.

7 THE COURT: Well, let me make clear to you why I'm
8 asking these questions. It's not to inquire into your personal
9 issues; it's because I need to make a determination that you're
10 competent to enter a plea. So for example, if you were being
11 treated for schizophrenia, that might raise an issue. If you
12 were having delusions, if you were to imagine -- not to take an
13 extreme example -- that Ms. Pearce had actually read each and
14 every one of those million documents, then we'd have an issue
15 we'd need to pursue.

16 So is the issue that you're pursuing with your
17 psychiatrist anything that has to do with your ability to
18 understand what's going on and what is the nature of reality
19 around you?

20 THE DEFENDANT: No, sir.

21 MS. PEERCE: Your Honor, and I can represent to the
22 Court that I believe Mr. Whittier is fully competent to enter
23 this plea. We will be submitting as part of the sentencing
24 package some material from a psychiatrist --

25 THE COURT: Okay.

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1 MS. PEERCE: -- explaining Mr. Whittier's situation.

2 THE COURT: Very good. Okay. Please be seated.

3 And Mr. Whittier, have you ever been treated or
4 hospitalized for alcoholism?

5 THE DEFENDANT: No, sir.

6 THE COURT: Have you ever been treated or hospitalized
7 for narcotics addiction?

8 THE DEFENDANT: No, sir.

9 THE COURT: Are you currently under the care of a
10 physician, other than a psychiatrist, for any reason?

11 THE DEFENDANT: No, sir.

12 THE COURT: In the last 24 hours have you taken any
13 pill or medicine of any kind?

14 THE DEFENDANT: I have. I took minocycline for acne,
15 sir.

16 THE COURT: Okay. Does that in any way, shape or form
17 affect your ability to understand these proceedings?

18 THE DEFENDANT: It doesn't.

19 THE COURT: Okay. In the last 24 hours have you taken
20 any narcotic of any kind?

21 THE DEFENDANT: No, sir.

22 THE COURT: In the last 24 hours have you taken any
23 alcohol of any kind?

24 THE DEFENDANT: No, sir.

25 THE COURT: Is your mind clear today?

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1 THE DEFENDANT: It is.

2 THE COURT: Do you understand these proceedings?

3 THE DEFENDANT: I do.

4 THE COURT: On the basis of defendant's responses to
5 my questions and my observations of his demeanor, I find that
6 he's fully competent to enter an informed plea at this time.

7 Now, Mr. Whittier, you have a right to be represented
8 by counsel at every stage of these proceedings, do you
9 understand?

10 THE DEFENDANT: I do.

11 THE COURT: And if you can't afford counsel at any
12 time, then the Court will appoint one for you free of charge to
13 represent you throughout these proceedings. Do you understand
14 that?

15 THE DEFENDANT: I do.

16 THE COURT: You're represented by Ms. Peerce and by
17 her firm. Are you satisfied with their representation?

18 THE DEFENDANT: I am.

19 THE COURT: Have you had a full opportunity to discuss
20 this matter with them?

21 THE DEFENDANT: I have.

22 THE COURT: Have you told them everything you know
23 about this matter?

24 THE DEFENDANT: I have.

25 THE COURT: All right. Now you are charged in

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1 indictment 07 Criminal 087 with various counts of securities
2 fraud and/or related securities offenses and you have
3 previously entered a plea of not guilty, but I understand that
4 you wish now to enter a plea of guilty to counts 1, 2 and 4.
5 Is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Before I can accept any plea of guilty, I
8 need to make certain, among other things, that you understand
9 the rights that you will be giving up if you plead guilty. So
10 I want to go over with you now the rights that you'll be giving
11 up. You understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And first, you have a right to a speedy
14 and a public trial by a jury on the charges against you. Do
15 you understand that?

16 THE DEFENDANT: I do.

17 THE COURT: And second, if there were a trial, you
18 would be presumed innocent and the government would be required
19 to prove your guilt beyond a reasonable doubt before you could
20 be convicted of any charge. Do you understand that?

21 THE DEFENDANT: I do.

22 THE COURT: And third, at the trial you'd have the
23 right to be represented by counsel, and once again, if at any
24 time you could not afford counsel, the Court would appoint one
25 to represent you free of charge. Do you understand that?

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1 THE DEFENDANT: I do.

2 THE COURT: Fourth, at the trial you would have the
3 right to see and hear all the witnesses and other evidence
4 against you, and your attorney could offer evidence on your own
5 behalf, could cross-examine the government's witnesses and
6 object to the government's evidence. Do you understand all
7 that?

8 THE DEFENDANT: I do.

9 THE COURT: Fifth, at the trial you would have the
10 right to testify if you wanted to, but no one can force you to
11 testify if you do not want to. And no suggestion of guilt
12 could be drawn against you if you chose not to testify. Do you
13 understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And finally, even if you were convicted of
16 one or more counts, you could appeal your conviction. Do you
17 understand that?

18 THE DEFENDANT: I do.

19 THE COURT: Now do you understand that if you plead
20 guilty, you will be giving up each and every one of those
21 rights we just discussed? Do you understand that?

22 THE DEFENDANT: I do.

23 THE COURT: Very good. Now does counsel want
24 counts 1, 2 and 4 read again here in open court or do you waive
25 the reading?

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1 MS. PEERCE: No, your Honor, we waive the public
2 reading.

3 THE COURT: The maximum punishment, Mr. Whittier, that
4 you face on count 1, securities fraud count, is a maximum
5 sentence of 20 years' imprisonment plus a fine, whichever is
6 greatest, either \$5 million or twice the amount of money
7 derived from the crime or twice the loss to the victims of the
8 crime, plus \$100 special assessment, plus a maximum term of
9 three years of supervised release to follow any imprisonment.
10 You understand those are the maximum punishments under count 1?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: Also, with respect to that count and each
13 of the counts that we're about to discuss, you understand that
14 if I were to impose a term of supervised release and you were
15 to violate any of the terms of supervised release, that
16 violation in and of itself could subject you to still further
17 imprisonment going even beyond the term of supervised release.
18 Do you understand that?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: Very good. Now the maximum punishment you
21 face on count 2, which is a count charging you with failing to
22 disclose ownership in excess of 5 percent of a publicly traded
23 security, is 20 years' imprisonment plus a fine of whichever is
24 greatest, \$5 million or twice the gross gain or twice the gross
25 loss, plus \$100 special assessment, plus up to three years'

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1 supervised release to follow any imprisonment. Do you
2 understand those are the maximum punishments under count 2?

3 THE DEFENDANT: I do.

4 THE COURT: And count 4, which charges you with a
5 separate instance of failing to disclose, in this case,
6 ownership in excess of 10 percent of a publicly traded security
7 carries a maximum sentence of 20 years' imprisonment, plus a
8 fine of whichever is greatest, either \$5 million or twice the
9 gross gain or twice the gross loss, plus a \$100 special
10 assessment, plus up to three years' supervised release to
11 follow any imprisonment. Do you understand those are the
12 maximum punishments under count 4?

13 THE DEFENDANT: I do.

14 THE COURT: Now do you also understand, Mr. Whittier,
15 that if you plead guilty to all three of those counts, the
16 punishment could be cumulative, so you would face, for example,
17 up to 60 years' maximum imprisonment if you plead guilty to all
18 three counts? Do you understand that?

19 THE DEFENDANT: I do.

20 THE COURT: Now actually, the sentence will be
21 determined not only by the statutory maximums but also by the
22 Court's consideration of a variety of factors mandated by
23 federal law, and one of those factors are the so-called
24 Sentencing Guidelines, which are certain laws that set a range
25 in which it is recommended that the Court sentence you,

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1 subject, however, to upward or downward departures. Have you
2 gone over the Sentencing Guidelines with your counsel?

3 THE DEFENDANT: I have.

4 THE COURT: And in that connection I've been furnished
5 with a letter agreement which takes the form of a letter dated
6 May 25th, 2007 from the government to defense counsel and
7 which we will mark as Court Exhibit 1 to today's proceedings.
8 And it appears, Mr. Whittier, that you signed it earlier today,
9 is that correct?

10 THE DEFENDANT: It is.

11 THE COURT: Before signing it, did you read it?

12 THE DEFENDANT: I did.

13 THE COURT: Did you discuss it with your counsel?

14 THE DEFENDANT: I have.

15 THE COURT: Did you understand its terms?

16 THE DEFENDANT: I did.

17 THE COURT: And did you sign it in order to indicate
18 your agreement to it?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now this letter agreement, Court
21 Exhibit 1, is binding between you and the government but it is
22 not binding on me. It is not binding on the Court, do you
23 understand that?

24 THE DEFENDANT: I do.

25 THE COURT: For example, with respect to the

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1 Sentencing Guidelines that we just discussed, this letter
2 agreement says that you and the government have calculated a
3 Sentencing Guidelines range of 188 to 235 months. I may agree
4 with that calculation or I may disagree with that calculation.
5 Even if I agree with that calculation, I may go higher, I may
6 go lower, or anywhere in between. And regardless of where I
7 come out on sentence, if you plead guilty, you will be bound by
8 my sentence. Do you understand that?

9 THE DEFENDANT: I do.

10 THE COURT: More generally, do you understand that if
11 anyone has made any kind of promise or prediction or estimate
12 or representation to you of what your sentence will be in this
13 case, that person or persons could be wrong and nevertheless,
14 if you plead guilty, you will still be bound by the sentence?
15 Do you understand that?

16 THE DEFENDANT: I do understand that.

17 THE COURT: Does the government represent that this
18 letter agreement is the entirety of any and all agreements
19 entered into between the United States and Mr. Whittier in
20 connection with this plea?

21 MR. FELDMAN: Yes, your Honor.

22 THE COURT: Does defense counsel confirm that that is
23 correct?

24 MS. PEERCE: Yes, your Honor. We do have a separate
25 proposed settlement with the SEC. I don't think that that

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1 would be responsive to your Honor's question, but I do want
2 to --

3 THE COURT: No, but thank you for --

4 MS. PEERCE: I did want your Honor to know there's a
5 proposed settlement which is subject to commission approval,
6 but that is the subject of the SEC proceeding.

7 THE COURT: Thank you for letting me know that.

8 Mr. Whittier, do you also confirm that the only
9 agreements you have made with the Department of Justice in
10 connection with this plea are those set forth in this letter
11 agreement, is that correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Incidentally, because the agreement,
14 although it's not binding on the Court, is binding between you
15 and the government, therefore under this agreement if I do
16 sentence you to 235 months or less, then under your agreement
17 with the government you've agreed not to appeal or collaterally
18 attack your sentence. Do you understand that?

19 THE DEFENDANT: I do.

20 THE COURT: Also, as part of this agreement, you have
21 agreed with the government to forfeit to the United States any
22 sum of money equal to \$5,535,571. Do you understand that?

23 THE DEFENDANT: I do.

24 THE COURT: All right. Now does the government
25 represent that if this case were to go to trial, it would,

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1 through competent evidence, prove every essential element of
2 these three counts beyond a reasonable doubt?

3 MR. FELDMAN: Yes, your Honor.

4 THE COURT: Does defense counsel know of any valid
5 defense likely to prevail at trial or any other reason why her
6 client should not plead guilty?

7 MS. PEERCE: I do not, your Honor.

8 THE COURT: Then Mr. Whittier, tell me in your own
9 words what it is you did that makes you guilty of these crimes.

10 MS. PEERCE: Your Honor, and if I may, Mr. Whittier
11 has prepared allocution that we have worked on with him. He is
12 obviously very nervous, your Honor, so if he can consult that
13 from time to time, just to make sure that he accurately conveys
14 to you what it is that he did.

15 THE COURT: Yes. That's fine.

16 THE DEFENDANT: I'd actually like to consult probably
17 a little bit more from time to time. Just read you, in my own
18 words, my allocution.

19 THE COURT: Okay.

20 THE DEFENDANT: I was a general partner of Wood River
21 Partners from February 2003 through the fall of 2005 and Wood
22 River Offshore from July of 2005 through the fall of 2005. In
23 that capacity I engaged in wrongful conduct, including
24 intentionally concealing the size of my beneficial ownership
25 position in a public company named Endwave Corporation. I

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1 purchased and sold Endwave stock knowing that the true -- the
2 truth regarding my Endwave holdings was material information
3 that was not publicly known.

4 In the course of conducting these trades I used
5 telephones, faxes and the internet.

6 As general partner of both funds, I misled my
7 investors in several ways. For example, I knowingly and
8 intentionally failed to cause the timely filings of forms with
9 the SEC pursuant to Rules 13d-1 and 16a, disclosing that I
10 beneficially owned in excess of 5 percent and 10 percent,
11 respectively, of shares of Endwave.

12 Further, the undisclosed concentrated position in the
13 Endwave security far exceeded the maximum cap for a single
14 stock provided for in the funds stated investment parameters.

15 In addition, in the summer of 2005 I caused a false
16 filing of a schedule 13D-G form, which did not accurately
17 disclose the complete and correct beneficial ownership I had of
18 a company called MediaBay. At the time of the filing I knew
19 that this was material information.

20 Some of my investors were in Manhattan and some of my
21 false or misleading statements were also made in Manhattan.

22 I knew at the time that what I was doing was wrong.
23 I've embarrassed myself and my family and caused harm to my
24 investors. I am sincerely remorseful and I am truly sorry.

25 THE COURT: All right. Thank you very much.

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1 Is there anything else regarding the factual portion
2 of the allocution that the government wishes the Court to
3 inquire about?

4 MR. FELDMAN: Your Honor, could you just inquire --
5 Mr. Whittier mentioned that the investors were in Manhattan and
6 that statements were made in Manhattan. Could you inquire
7 whether he actually had brokerage accounts in Manhattan and
8 where the MediaBay and Endwave stock were purchased.

9 THE COURT: Okay. Did you?

10 THE DEFENDANT: Sir, I had investment banks that I did
11 business with, investment banks that were based in New York
12 City.

13 THE COURT: Okay. Anything else?

14 MR. FELDMAN: No, your Honor.

15 THE COURT: All right. Is there anything else
16 regarding any aspect of the allocution that either counsel
17 wishes the Court to further inquire about before I ask the
18 defendant to formally enter his plea? Anything further from
19 the government?

20 MR. FELDMAN: Your Honor, on my checklist the one
21 thing I see was omitted was questioning the defendant about
22 restitution, that that's mandatory to counts 1, 2 and 4 as
23 well.

24 THE COURT: Yes. Thank you for reminding me of that.
25 Although actually, I don't see it in your plea agreement.

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1 MR. FELDMAN: The third paragraph on page 2, your
2 Honor.

3 THE COURT: Ah. Okay.

4 So Mr. Whittier, in addition to all the other
5 punishments we talked about, do you understand that if you
6 enter your plea of guilty in a moment, you will also be subject
7 to a mandatory order of restitution to the victims of your
8 crimes?

9 THE DEFENDANT: I do understand that.

10 THE COURT: All right. Anything else?

11 MR. FELDMAN: No, your Honor.

12 THE COURT: Anything from ' defense counsel?

13 MS. PEERCE: No, your Honor.

14 THE COURT: Then Mr. Whittier, in light of everything
15 we've now discussed, how do you now plead, first to count
16 number 1, the securities fraud count, guilty or not guilty?

17 THE DEFENDANT: Guilty.

18 THE COURT: And how do you plead to count number 2,
19 charging you with failing to disclose ownership in excess of
20 5 percent of a publicly traded security, guilty or not guilty?

21 THE DEFENDANT: Guilty.

22 THE COURT: And finally, how do you plead to count 4,
23 charging you with failing to disclose ownership in excess of
24 10 percent of a publicly traded security, guilty or not guilty?

25 THE DEFENDANT: Guilty.

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1 THE COURT: And are you pleading guilty voluntarily?

2 THE DEFENDANT: I am.

3 THE COURT: Because the defendant has acknowledged his
4 guilt as charged, because he's shown he understands his rights,
5 and because his plea is entered knowingly and voluntarily and
6 is supported by an independent basis in fact containing each of
7 the essential elements of each of the offenses, I accept his
8 plea and adjudge him guilty of counts 1, 2 and 4 of
9 Indictment 07 Criminal 087.

10 Please be seated.

11 So Mr. Whittier, the next stage in this process is
12 that the probation department will prepare what's called a
13 presentence report to assist the Court in determining sentence.
14 And as part of that, you will be interviewed by the probation
15 officer. You can have your counsel present to advise you of
16 your rights. But my practice is, if you want to qualify for
17 full credit of acceptance of responsibility, you personally
18 need to answer any and all questions put to you by the
19 probation officer. Do you understand that?

20 THE DEFENDANT: I do.

21 THE COURT: After that report is in draft form but
22 before it's in final form, you and your counsel and also
23 government counsel have a chance to offer suggestions and
24 corrections and additions to the probation officer, who will
25 then prepare the report in final to come to me.

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1 Independent of that, counsel for both sides are hereby
2 given leave to submit directly to the Court in writing any and
3 all materials bearing on any aspect of sentence, provided those
4 materials are submitted no later than one week before sentence.

5 Now we will set this sentence down for --

6 MS. PEERCE: Your Honor, if I might request a
7 sentencing date of mid October. As your Honor is aware from
8 the plea agreement, there are complicated financial
9 requirements that Mr. Whittier has to meet.

10 He also has a 5-year-old child with autism. We would
11 be submitting, along with -- in our sentencing package,
12 material related to his child's condition and the complicated
13 sentencing.

14 I also, on a personal level, plan on taking the last
15 two weeks of August off.

16 For all those reasons, I would respectfully request,
17 to enable this complicated financial package to be met and for
18 the reasons of the son, a midOctober sentencing date, if that
19 would be acceptable to the Court.

20 THE COURT: What's the government's view?

21 MR. FELDMAN: Your Honor, in our negotiations it was
22 clear to us that this is a complicated matter related to
23 forfeiture and real estate transactions. We have no objection
24 to the request.

25 THE COURT: All right. It is not my usual policy, as

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1 counsel are aware, to put off sentencing. However, under these
2 circumstances I will do so. I want both sides to understand
3 that the date we're now about to set is a firm, fixed and final
4 date and will not be subject to further adjournments. So if,
5 for example, problems arise in the financial arrangements or
6 anything like that, I'm sorry, but we still go forward with the
7 sentence.

8 So how about October 15th at 2 p.m.?

9 MS. PEERCE: That's fine, your Honor. I appreciate
10 it.

11 THE COURT: All right. Very good.

12 MS. PEERCE: Your Honor, there's one more thing. The
13 proposed settlement with the SEC provides that the prejudgment
14 interest that Mr. Whittier is paying to the SEC is going to be
15 paid towards restitution, and that money needs to be paid prior
16 to sentencing. There will not be a restitution order in place
17 for the clerk to accept such a check, and so at the appropriate
18 time I would propose to your Honor that I submit a proposed
19 order, with the government's consent, that that money be
20 accepted by the clerk for restitution, if the commission
21 accepts the proposed settlement that is being submitted. So I
22 just wanted to alert your Honor to that possibility.

23 THE COURT: Yes, that's fine. You can just without
24 further ado send that proposed order along when it becomes
25 ripe, so to speak, once the SEC has approved of the settlement.

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1 Experience suggests that in contrast to all other human beings,
2 the clerk of the court will not accept money except with a
3 written order. So I'm glad you've anticipated that.

4 MS. PEERCE: That's exactly why I did, your Honor.

5 THE COURT: Very good.

6 Anything else?

7 MS. PEERCE: Not from the defense, your Honor.

8 MR. FELDMAN: Nothing from the government, your Honor.

9 THE COURT: Very good. Thanks very much.

10 THE DEPUTY CLERK: All rise.

11 o0o